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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE, Petitioner-Appellant v. JEANNE S. WOODFORD, Director of the Department of Corrections, JILL L. BROWN, Warden And Does 1-50 Respondents-Appellee	)	CA # 05-15042 DC # C 04-5381 JF EXECUTION IMMINENT: 1/19/05

APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE JEREMY FOGEL
United States District Judge

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I. INTRODUCTION

Plaintiff/appellant Donald J. Beardslee ("Beardslee") is scheduled to be executed at midnight on January 19, 2005. On December 20, 2004, Beardslee filed a lawsuit in the Northern District of California pursuit to 42 U.S.C. § 1983 in which he sought 1) to enjoin his execution under the Eighth Amendment to the United States Constitution because there is a demonstrated risk that Beardslee will not be properly sedated and will suffer an unconstitutional level of pain during the process, and 2) to enjoin the administration of the pancuronium bromide, a paralyzing neurotoxin, on the grounds that administering the drug will violate his First Amendment rights by preventing him from communicating to the assembled witnesses and the public at large that he has not been properly sedated and that he is being tortured.

In conjunction with his complaint, Beardslee filed a motion for a preliminary injunction and a motion for expedited discovery and to compel production of documents. (ER 14, 474.) The motion for preliminary injunction was argued on January 6, 2005 in the district court. (ER 692.) On January 7, 2005, the district court denied the motion and denied the discovery motion as moot. (ER 670.)

Beardslee filed his notice of appeal on January 10, 2005. On January 14, 2005, following an expedited briefing schedule and oral argument, this Court issued an opinion affirming the district court's judgment.

Beardslee respectfully requests rehearing by the panel and the en banc court on the following points:

B. **EIGHTH AMENDMENT CLAIM**

a. The Need for Panel Rehearing

Panel rehearing is necessary because the panel has misapprehended material facts and the applicable law.

The issue in this litigation is not the theoretical sufficiency of five grams of sodium pentothal to adequately render Beardslee unconscious before the other two drugs hit his system. Rather, "[t]he key element in this procedure is the proper administration of the barbiturate." (Opinion at 20.) It is conceded that if the inmate is conscious, pancuronium bromide and potassium chloride will each cause an unconstitutional level of physical and psychological suffering. (Opinion at 13, 20.)

In this adversary proceeding, respondents have not carried a single factual or legal point in this Court. The panel's reasoning supports the proposition that the district relied on erroneous legal premises (the *Reid* case) and abused its discretion/made clearly erroneous findings of fact when, relying on *Reid*, it held

that "the likelihood of such an error [in administration] occurring 'is so remote as to be nonexistent.'" (ER 674.)

- The panel agreed that the Kevin Cooper litigation does not control this case. (Opinion at 7-8.) Thus, the district court relied on an erroneous legal premise in holding that it did.
- This Court does not rely on any of the cases that the district court relied on in *Cooper*, and it does not rely on *Reid v. Johnson*, 333 F. Supp. 2d 543 (D.Va.2004), the Virginia case that the district court relied on below to hold that there were no problems in administration and delivery in California even though *Reid* expressly refused to consider problems in administration and delivery. Obviously, the district court relied on an erroneous legal premise in relying on *Reid*.
- The panel acknowledges that the evidence shows that inmates who were previously executed by lethal injection "may have . . . been conscious during portions of the executions" (Opinion at 21.) (Those "portions," of course, are the portions where the undisputedly unconstitutional levels of pain and psychological terror would have occurred.)
- The panel agrees that Beardslee's expert's analysis of the California execution logs "raises extremely troubling questions about the protocol." (Opinion at 21-22.)

- The panel also appears to recognize that Beardslee could not have offered more evidence at this stage in light of the State's failure to disclose the entire protocol and its generally unprincipled lack of openness about this issue. (Opinion at 24.)
- The panel agrees that California's "protocol was never subjected to the rigors of scientific analysis." (Opinion at 20.)
- The panel does not fault Beardslee for the timing of the lawsuit. (Opinion at 8-10.)

This last point is critical, because it means Beardslee, having timely filed his exhausted claims when they were ripe, could not have obtained discovery to bolster his position. It is difficult to imagine what more Beardslee could have done at this stage of the litigation.[1] In light of the above findings and conclusions of law, the panel should have reversed the district court.

Apart from its failure to find Beardslee's showing of fact and law dispositive as described above, the panel misapprehended several material facts.

- To the extent the panel wanted to see more concrete evidence that previously executed inmates were conscious, such evidence would be impossible to produce ***at any point in the litigation*** because under the protocol, ***the***

[1] The panel also does not contest Beardslee's argument that he satisfied the other prongs for granting a preliminary injunction: likelihood of irreparable injury, balance of hardships weighing in his favor and the fact that an injunction serves the public interest.

condemned man's level of consciousness is not monitored during the procedure. The state solves this problem by administering pancuronium bromide to ensure the *appearance* of unconsciousness.

- To the extent the panel wanted to see blood level evidence for California executions similar to that introduced from other states' executions, such evidence would be impossible to produce because, as the Attorney General admitted at argument, ***California does not conduct toxicology studies or perform autopsies on the people it executes***—another form of willful ignorance that this Court should condemn.
- Although generally recognizing that "the State has tendered only minimal evidence in response to Beardslee's claims," (Opinion at 23,) the panel does not directly address, and therefore appears not to have considered, respondents' complete and utter failure to offer expert testimony that would explain the "extremely troubling questions" raised by the execution logs.
- If Beardslee is to be executed under California's "extremely troubling" protocol, he is entitled to a decision that explains ***point by point*** why the unrebutted testimony by his expert anesthesiologist about what has happened in California executions is insufficient to entitle him to proceed further.
- "[T]he value of Beardslee's expert's interpretations of the witness accounts and execution log entries" was ***not*** "undercut by his concession" that

respondents' expert had greater expertise in pharmacokinetics and pharmacodynamics. (Opinion at 22.) The panel ignored the fact that respondents' expert in *Cooper* assumed proper administration and delivery of sodium thiopental ***but did not opine that proper administration and delivery would actually occur***. (ER 235-41.)

- Relatedly, the panel gives inappropriate weight to respondents' expert's testimony about the theoretical effectiveness of sodium thiopental, (Opinion at 22,) when theoretical effectiveness has been conceded and is not an issue in this case. (Opinion at 22.) The panel's reasoning is inconsistent with its correct observation that "[t]he key element in this procedure is the proper administration of the barbiturate." (Opinion at 20.)
- The panel ignores the complete lack of evidence about monitoring of the injection site, and the training, qualifications and psychological suitability of those conducting the execution, all of which has been deemed relevant in other cases. *State v. Webb*, 252 Conn. 128, 133-34, 142-44 (2000), *Abdur'Rahman v. Bredesen*, 2004 Tenn.App.LEXIS 643 (February 23, 2004) at **16, 17, 37, 66, 68.

The panel also erred in holding that Beardslee had not clearly satisfied, *at the very least*, the *Martin* test that authorizes preliminary relief when serious questions are raised and the balance of hardships tips heavily in the moving

party's favor. *Martin v. International al Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984). The panel expressly states that Beardslee raised serious questions about the protocol, and, in light of the panel's statement that the evidence from the execution logs was "extremely troubling," he obviously raised serious questions about past California executions as well. There is no question that the balance of hardships seriously favors him in light of the "extremely troubling" probability that he will be conscious during the execution. Because this Court has held that every key factual and legal premise relied on by the district court was incorrect, the injunction should issue. Beardslee also established probable success on the merits. Common sense tells us that if respondents had anything to say that was remotely defensible, they would have said it.

b. <u>The Need for En Banc Consideration</u>

1. <u>The Proceeding Involves Questions of Exceptional Importance</u>.

a. <u>Should the Burden Shift to Respondents Under the Facts and Circumstances Presented in this Case?</u>

Beardslee submits that if the burden of proof on this issue was his and his alone, he discharged it. Nonetheless, exactly how motions for preliminary injunction should be litigated in this unique context is an important question of law that this Court should resolve. Notwithstanding the arguably applicable burden of proof, the panel clearly felt that there was a moral core to this issue that required

respondents to justify their actions. Respondents failed to do so. This failure should have been held against them in the analysis.

In light of the "extremely troubling" data from the execution logs, the omissions from the protocol and respondents' lack of openness, if this case were litigated as a state court tort suit, it would probably proceed under a *res ipsa loquitur* theory. In *Ybarra v. Spangard,* 25 Cal. 2d 486 (1944), the California Supreme Court held that where a plaintiff received unusual injuries while unconscious and in the course of medical treatment, all defendants who had any control over his body or the instrumentalities which might have caused the injuries were inferred negligent and had to give an explanation of their conduct. In *Wellman V. Faulkner,* 715 F.2d 269 (7th Cir. 1983), the Seventh Circuit suggested that *res ipsa* presumption was appropriate in Eighth Amendment litigation challenging prison conditions in connection with "a motion to dismiss or otherwise early in the proceedings" before discovery is available. *Id.* at 276. Similar treatment was appropriate here.

b. Does California's Lethal Injection Protocol Expose Condemned Inmates to an Unconstitutional Level of Physical Pain and Psychological Suffering?

Again, Beardslee urges the Court to take a pragmatic approach to this litigation. Respondents have not responded on the merits to the concerns raised by the execution logs and the gaps in Procedure 770 because they have nothing to say

that any court would credit. The unrebutted expert opinion about the data from the California execution logs alone would entitle Beardslee to summary judgment. This Court should not shy away from that fact.

The panel has validated the timing of this litigation. Therefore, other cases are likely to come up in an identical posture and, if respondents have their way, without additional new evidence from prior executions, including Beardslee's. At the very least, in light of the serious, unrebutted showing that Beardslee made in a fully exhausted complaint that had to be filed when it was, and was made without publicly available data or the benefits of discovery, Beardslee is entitled to the full court's consideration of whether the district court abused its discretion in denying preliminary relief.

II. FIRST AMENDMENT CLAIM

A. The Need for Panel Rehearing

Panel rehearing is necessary because the panel has misapprehended the applicable law. There is no basis in law or logic for holding that Beardslee has to make some kind of threshold showing that the execution process is likely to fail before his First Amendment right to communicate about such a failure is triggered. Courts have upheld First Amendment rights while openly acknowledging the possibility that there is no government wrongdoing to uncover. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 5 (1986) (withheld transcript described as

"neither 'inflammatory' nor 'exciting'"); *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002) (describing the procedures the public was barred from witnessing as only "possibly painful"). Most Americans would be surprised to learn that their First Amendment rights were subject to any similar contingencies. This may seem like an insignificant case about an expendable man, but the panel is setting a dangerous precedent.

The panel impliedly acknowledges that the administration of pancuronium bromide is, in essence, a content-based restriction in that it only restricts Beardslee from speaking if he has something to say that is adverse to the government's interests, e.g., that he has not been properly sedated and that he is being tortured.[2] (Opp. at 13, 26.) Under the panel's reasoning, Beardslee's First Amendment right to speak would mature in the middle of the execution process when the pancuronium bromide hit his system while he was not properly sedated. Thus, under the panel's reasoning, Beardslee's First Amendment rights vest and are violated at the same moment. That cannot be the law. Assuming such a showing was required, for the reasons discussed in the preceding section, the panel should have held that Beardslee discharged his burden.

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[2] When First Amendment rights are restricted, the legitimacy of the government's stated penological objective depends on whether the restriction is content neutral. *Turner v. Saffley*, 482 U.S. 78, 90 (1987). The panel appears to recognize that respondents made no attempt to defend pancuronium bromide as serving a legitimate penological purpose, (Opinion at 24,) and that none of the other *Turner* factors favor respondents.

The panel also misapprehends the core of Beardslee's First Amendment claim. While his right to cry out in pain is an aspect of fundamental human dignity that is worthy of protection, Beardslee's motivation for pursuing this action is to contribute information to the public debate about capital punishment. This Court has upheld the public's First Amendment right to view execution procedures in the interest of openness and public debate. *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). This Court erred in not evaluating Beardslee's First Amendment claim in that context.

B. The Need for En Banc Consideration

1. The Proceeding Involves a Question of Exceptional Importance.

Under *Turner v. Saffley*, 482 U.S. 78 (1987), an inmate maintains all constitutional rights that are not inconsistent with a legitimate penological objective. Given that respondents refused to defend the administration of pancuronium bromide, the record contains no legitimate penological purpose. This Court should hold that unless the restriction on the ability to communicate is incidental to a constitutional method of extinguishing life,[3] the inmate retains his First Amendment right to communicate about what is being done to him.

[3] Although pancuronium bromide paralyzes breathing, it is, standing alone, unconstitutional because it causes death by prolonged suffocation. *Campbell v. Wood*, 18 F.3d 662, 684, 687 & n.17 (9th Cir. 1994), *Fierro v. Gomez*, 77 F.3d 301, 308 (9th Cir. 1996). In light of these arguments, that were not made in *Cooper*, respondents abandoned their defense of pancuronium bromide.

2. En Banc Consideration is Necessary to Maintain Uniformity of the Court's Decisions: *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002)

Following a bench trial, the Northern District of California held that respondents violated the First Amendment rights of the public and the media by drawing a curtain over the viewing area while the inmate was led in, strapped down and the intravenous shunts inserted into his veins. *California First Amendment Coalition v. Woodford*, 2000 U.S. Dist. LEXIS 22189 (N.D. Cal. July 26, 2000) ("*CFAC I*"). This Court affirmed. *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) ("*CFAC II*", collectively, the "*First Amendment Coalition*" case"). The panel's conclusion that the State's administration of pancuronium bromide will not violate Beardslee's First Amendment rights eviscerates the *First Amendment Coalition* case.

CFAC was not about the right to bear witness at a state ritual or a voyeuristic tabloid right to be present when a condemned man flatlines. It was about information gathering and fostering public debate.

> "Independent public scrutiny—made possible by the public and media witnesses to an execution—plays a significant role in the proper functioning of capital punishment. . . . To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the "initial procedures," which are invasive, possibly painful and may give rise to serious complications." *Id.* at 876.

The district court had held to the same effect.

> "The public's perception of the amount of suffering endured by the condemned and the duration of the execution is necessary in determining whether a particular execution protocol is acceptable under [the] evolutionary standard. . . . Although lethal injection is generally regarded as the most humane and painless execution method presently available, technology and society's perceptions may evolve in the future. If there are serious difficulties in administering lethal injections, society may cease to view it as an acceptable means of execution and support a return to lethal gas or electrocution or push for development of another execution method. Or a majority of the public may decide that no method of execution is acceptable. Eyewitness testimony is crucial to the public's evaluation of how this extreme punishment is performed. . . ." *CFAC I*, 2000 U.S. Dist. LEXIS 22189 at **24-26.

A listener implies a speaker; a viewer implies that there is something to see. There is no more fertile source of information about "difficulties in administering lethal injections" than the condemned man himself who will suffer the consequences of the error. The First Amendment protects his right to express himself in this matter.

If the panel's decision is allowed to stand, then respondents will have total control over public perception of the most critical aspect of the execution process, contrary to the policies of the *First Amendment Coalition* case.

> "An informed public debate is the main purpose for granting a right of access to governmental proceedings. Prison officials simply do not have the same incentives to describe fully the potential shortcomings of lethal injection executions. As Warden Calderon's memo demonstrates, a prison official's perception of the execution process may be vastly different—and markedly less critical—than that of the public." *CFAC II* at 884.

This is particularly inappropriate given that, as this Court recognized during oral argument, respondents intentionally conceal critical aspects of the execution process from the public to stifle debate. This Court affirmed Judge Walker's finding that Judge Walker's finding that "the procedure was motivated at least in part by a desire to conceal the harsh reality of executions from the public." *Id.* at 880.

In its opinion, the panel only discussed the *First Amendment Coalition* case in a footnote and in reference to arguments by *amici*. The panel stated that *amici's* concerns that pancuronium bromide acts as a "chemical curtain" that interferes with the public's right to know whether or not the condemned man is suffering "may have merit". (Opinion at 26, n. 13.)[4] This was Beardslee's argument as well, except that he relied on the *First Amendment Coalition* case for the proposition that the capital punishment debate requires actual evidence of what occurs during executions, and to defend his right under the First Amendment to provide that evidence pursuant to the same Ninth Circuit case that affirmed the public's right to receive it.

The panel's failure to harmonize Beardslee's claim with the *First Amendment Coalition* case leads to absurd results. The public is allowed to view

[4] The panel initially said that the argument was "compelling" but changed the language. The panel was right the first time.

only what the State wants it to view in direct contradiction to the teaching of that case. One can easily imagine a scenario where Beardslee, alone, unmonitored, and by all appearances serene, undergoes the same torment that prior inmates underwent. The press will write their stories, and some accounts will inevitably argue that "Beardslee died peacefully." The more alarming stories will come from those reporters who, aware of the controversy surrounding pancuronium bromide, add some lurid follow-up like, "Or did he. We may never know."

This Court should grant en banc review to confirm that under the *First Amendment Coalition* case, a condemned man's right to impart information about what is occurring during his execution is limited only by any legitimate penological objective that respondents might defend under *Turner*.

III. CONCLUSION

For the foregoing reasons, Beardslee's petition for rehearing with suggestion for rehearing en banc should be granted.

Dated: January 14, 2005

/s

STEVEN S. LUBLINER
Attorney for Appellant
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CERTIFICATE OF COMPLIANCE (Circuit Rules 32-1, 32-4)

Pursuant to Ninth Circuit Rules 32-1, I hereby certify that the foregoing petition is produced in a proportional font (Times New Roman) of 14 point type and utilizes double line spacing, except in footnotes and extended quotations which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 3,211 words (exclusive of the table of contents, the table of authorities, the proof of service and this certificate).

Dated: January 14, 2005

/s

STEVEN S. LUBLINER
Attorney for Appellant
Donald J. Beardslee

PROOF OF SERVICE

I, Steven S. Lubliner, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am in practice at the address indicated; am a member of the State Bar of California and the Bar of this Court; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s) in the manner indicated below:

APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

() by today depositing, at Petaluma, California, the said document(s) in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid (and/or):

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() by today personally delivering the said document(s) to the person(s) indicated below in a manner provided by law, by leaving the said document(s) at the office(s) or usual place(s) of business, during usual business hours, of the said person(s) with a clerk or other person who was apparently in charge thereof and at least 18 years of age, whom I informed of the contents.

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Executed in Petaluma, California on January 14, 2005

/s